IN THE

Supreme Court of the United States

October Term, 1977

Supreme Court, U. S.
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No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioner,

v.

ALLAN BAKKE,
Respondent.

BRIEF AMICI CURIAE OF ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH; COUNCIL OF SUPERVISORS AND ADMINISTRATORS OF THE CITY OF NEW YORK, LOCAL 1, AFSA, AFL-CIO; JEWISH LABOR COMMITTEE; NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA"); AND UNICO NATIONAL

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Opinions Below

The opinions of the California Supreme Court are reported at 18 Cal. 3d 34, 132 Cal. Rep. 680, 553 P.2d 1152. The trial court's opinion is set out as Appendix F to the Petition for Certiorari.

Jurisdiction

The jurisdiction of this Court was invoked under 28 U.S.C. §1257(c). Certiorari was granted on 22 February 1977. —— U.S. ——, 97 S. Ct. 1098, 51 L.Ed. 2d 535.

Consent of the Parties

Petitioner and Respondent have consented to the filing of this brief, and their letters of consent are on file with the Clerk of the Court.

Questions Presented

May a State, consistently with the commands of the Fourteenth Amendment, exclude an applicant from one of its medical schools solely on the ground of the applicant's race?

May a State, consistently with the commands of the national Civil Rights Acts, exclude an applicant from one of its medical schools solely on the ground of the applicant's race?

Constitutional and Statutory Provisions

The Fourteenth Amendment to the Constitution of the United States provides:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42 U.S.C. §2000d provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Title 42 U.S.C. §1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Interest of the Amici Curiae

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews. The Anti-Defamation League was organized in 1913 as a section of B'nai B'rith to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. The Anti-Defamation League is vitally interested in protecting the civil rights of all persons, be they minority or majority, and in assuring that every individual receives equal treatment under law regardless of his or her race or religion.

Among its many other activities directed to these ends, the Anti-Defamation League has in the past filed amicus briefs in this Court urging the unconstitutionality or illegality of racially discriminatory laws or practices in such cases as, *e.g.*, *Shelley* v. *Kraemer*, 334 U.S. 1 (1948); *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Colorado Anti-Discrimination Commission* v. *Continental Airlines, Inc.*, 372 U.S. 714 (1963); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1969); *San*

Antonio Independent School District v. *Rodriguez*, 411 U.S. 1 (1973); *De Funis* v. *Odegaard*, 416 U.S. 312 (1974); *Runyon* v. *McCrary*, 427 U.S. 160 (1976); *McDonald* v. *Santa Fe Trail Transporation Co.*, 427 U.S. 273 (1976).

The Council of Supervisors and Administrators of the City of New York, Local 1, AFSA, AFL-CIO, is a labor organization representing pedagogical supervisory and administrative staff within the city school district of the City of New York. Its membership, numbering about 4,500, is professionally committed to assuring that New York City school children receive the finest education available from a staff recruited and promoted according to objective non-political criteria of merit and fitness.

The Jewish Labor Committee, organized in 1934, is a national civil rights organization concerned with the preservation of constitutional rights for all Americans. It has, over the years, submitted or joined in amicus curiae briefs to various courts including the United States Supreme Court.

The National Jewish Commission on Law and Public Affairs ("COLPA") is a voluntary association of attorneys and social scientists organized to combat discrimination and is committed to securing the right of observant Jews, along with other Americans, to equality of opportunity. COLPA is the principal non-governmental agency involved in the protection of the legal rights of observant Jews. COLPA has appeared in that capacity before numerous courts, including this honorable Court.

UNICO National is the nation's largest Italian-American community service and public affairs organization, with

140 chapters throughout the United States. UNICO National represents approximately 50,000 people and has as its objectives to foster, encourage and promote the Italian heritage and culture as a creative force for the good of all Americans and to enhance the interest of each member in the public welfare of his community. UNICO National is 55 years old and has been active in the areas of scholarship, aid to the physically handicapped, and the fostering of research in the afflictions of mental health.

The "numerus clausus," the racial quota that is involved in this case, is of particular concern to the amici because of the long history of discrimination against Jews and others by the use of quotas, both in Europe and in the United States.* This brief is not an argument on behalf of any single minority, but on behalf of the free and open society mandated by the Constitution. It may be noted, nevertheless, that after only three or four decades of non-discriminatory admissions, in which creed, color, and ethnic origins have been rejected as appropriate criteria for university admissions, the universities, which for centuries set the style in excluding or restricting Jewish students and those of various other religious, racial, and ethnic minorities, may again be able to do so, again in the name of enlightenment and diversity, if the decision below is not af-

* See, *e.g.*, HIGHER EDUCATION FOR AMERICAN DEMOCRACY, A REPORT OF THE PRESIDENT'S COMMISSION ON HIGHER EDUCATION 35 (1947); KENNEDY, JIM CROW GUIDE TO THE U.S.A. 92 (1959; 1973); Steinberg, *How Jewish Quotas Began*, COMMENTARY 67 (Sept. 1971); see also KISCH, THE JEWS IN MEDIEVAL GERMANY: A STUDY OF THEIR LEGAL AND SOCIAL STATUS (2d ed. 1970); MARCUS, THE RISE AND DESTINY OF THE GERMAN JEW 11 (1934); SEGAL, THE NEW POLAND AND THE JEWS 197 (1938); KOCHAN, ed., THE JEWS IN SOVIET RUSSIA SINCE 1917 1-2, 17, 90, 91, 92, 94, 146 (2d ed. 1972); BARON, THE RUSSIAN JEW UNDER TSARS AND SOVIETS 47 (1964).

firmed. See, *e.g.*, Steinberg, *supra;* Kramer, *What Lowell Said,* The American Hebrew 394 (1923).

Summary of Argument

The only question presented by this case is whether the state University of California can utilize race as the determinative factor in the admission and exclusion of candidates for its medical school at Davis. This Court has consistently read the Fourteenth Amendment to forbid the use of race as a criterion for admission. Indeed, we submit that the specific question raised here was resolved by this Court in *Sweatt* v. *Painter,* 339 U.S. 629 (1950). Nothing in the opinions or judgments of this Court in the intervening years has detracted from strict adherence to this principle.

As Mr. Justice Douglas, the only member of the Court to address the substantive question in *DeFunis* v. *Odegaard,* 416 U.S. 312, 342-44 (1974), wrote:

> The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized. . . .
>
> If discrimination based on race is constitutionally permissible when those who hold the reins can come up with "compelling" reasons to justify it, then constitutional guarantees acquire an accordionlike quality. . . . It may well be that racial strains, racial susceptibility to certain diseases, racial sensitiveness to environmental conditions that other races do not experience, may in an extreme situation justify differences in racial treatment that no fairminded person would call "invidious" discrimination. Mental ability is not

> in that category. All races can compete fairly at all professional levels. So far as race is concerned, any state-sponsored preference to one race over another in that competition is in my view "invidious" and violative of the Equal Protection Clause.

A variety of arguments have been advanced on behalf of the University designed to rationalize an abandonment of the established standards of the Equal Protection Clause in determining the constitutionality of the racial discrimination practiced against Respondent here. All of them turn on the fact that Bakke is white and was excluded in order to make a place for nonwhite students. Whatever the rationalization, however, this approach can only be sustained if the Fourteenth Amendment be construed as affording members of certain racial and ethnic groups greater Constitutional rights than it affords others. Anything less than a reaffirmation of the right of the individual to equal treatment under law, whatever his or her race, will lead to further arbitrary state action, to increased racial tensions, and to a loss of faith in the rule of law itself with untold damage to the fabric of society.

The constitutional question presented by this case, however, need not be decided here. For, whether or not the Fourteenth Amendment bars this form of racial classification, the laws of the United States do. Title 42 U.S.C. §1981 forbids exclusion from schools on a racial basis even where the school is a private school. *Runyon* v. *McCrary,* 427 U.S. 160 (1976). And the rights to nondiscrimination afforded by §1981 are granted equally to all, whites as well as blacks. *McDonald* v. *Sante Fe Trail Transp. Co.,* 427 U.S. 273 (1976). The reading given §1981 by this Court's recent decisions is even more appropriate

to the language of 42 U.S.C. §2000d, and the question raised below under that statute should be resolved in favor of Respondent as it was by the trial court below. (App. F. to Petition for Certiorari at 117A.) This can be done without reaching the merits of the constitutional question and despite the fact that the opinion below did not address the statutory issues.

ARGUMENT

I

Statement of Issues and Non-Issues

A detailed restatement of the facts here is neither appropriate nor necessary. It only need be said that sixteen places in Petitioner's entering class at the medical school at Davis were closed to Respondent and all other white applicants because of their race. In light of the numerous issues proferred by Petitioner and the numerous amicus briefs in support of the Petitioner, however, it is appropriate and necessary to state what the single issue before this Court is and also what issues are not presented to this Court on the facts and record of this case.

Respondent Bakke was precluded from admission to the state medical school because he is white. The sole question for adjudication here is whether such exclusionary action by the State of California on the ground of Respondent's race is invalid under the Constitution and laws of the United States.

Had Mr. Bakke been excluded because he was black, there could be no question of the invalidity of the state action. *Sweatt* v. *Painter,* 339 U.S. 629 (1950). The Constitution and laws which forbid exclusion of blacks solely because they are black do not permit exclusion of whites solely because they are white. "If the Constitution prohibits exclusion of blacks and other minorities on racial grounds, it cannot permit the exclusion of whites on similar grounds; for it must be the exclusion on racial grounds which offends the Constitution, and not the particular skin color of the person excluded." BICKEL, THE MORALITY OF CONSENT 132-33 (1975). The Constitution, like the Civil Rights Laws, speaks to equal protection not to preference.

Perhaps because the answer to the essential question presented by this case is so plain, a multitude of other questions have been offered to the Court for resolution, none of which is relevant to this case.

This is not a case concerned with framing a remedy to right a constitutional wrong. Unlike the public school desegregation cases brought before this Court, there is no question here of any segregation or racial exclusion practiced by the University of California that could call for remedy. In the case of a constitutional violation, a racial remedy might be directed, but it would have to be confined to a cure of the constitutional violation. *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 16 (1971); *Milliken* v. *Bradley,* 418 U.S. 717, 744 (1974); *Dayton Board of Education* v. *Brinkman,* No. 76-539, Slip op., at 13-14, 45 U.S.L.W. 4910, 4913 (27 June 1977). Since there is no such violation to be cured here, these precedents reject rather than justify the racial discrimination imposed by Petitioner.

The question in this case is also not whether the University of California is restricted in its admissions standards to such matters as the applicant's Medical College Admissions Test and college record. Nor does the case test the validity of these criteria as measures of potential achievement in medical school or medical practice. And there is no suggestion in the record of any evidence that the college grades and/or MCAT scores are invalidly biased in favor of or against any racial group. By the judgment below, the choice of criteria for admission, except for the criterion of race, is left totally to the University, including special privileges for the socially or economically deprived. It is the University that has chosen to utilize scholastic records and tests for all applicants, and it chooses among black applicants, albeit separately, as it chooses among white applicants, on the basis of these standards. Presumably the University considers these standards relevant for all applicants. The judgment below doesn't require adherence to any particular criteria, but only abstention from admission or exclusion by race.

Nor is the question in this case whether the national government may, under certain circumstances, constitutionally indulge, or compel states to indulge, racial classifications pursuant to Congress's constitutional powers, whether under Article I, or §5 of the Fourteenth Amendment, or §2 of the Fifteenth Amendment. *United Jewish Organizations of Williamsburgh Inc.* v. *Carey,* —— U.S. ——, 97 S.Ct 996, 51 L. Ed. 2d 229 (1977). It is clear from this Court's judgments that the restraints on the states, to which the Fourteenth Amendment's strictures are directed, are greater than the limits placed on the national government by the Fifth Amendment. *Hampton* v. *Mow Sun*

Wong, 426 U.S. 88, 100 (1976). Furthermore, the racially conscious redistricting under the Voting Rights Act sanctioned in *Williamsburgh* deprived no individual of the right to vote on account of race. Here, by contrast, Respondent and other white applicants were displaced from the Davis Medical School's entering class solely because of their race. Neither is there a question here of conflicting constitutional rights. There is no constitutional right asserted by Petitioner to be balanced against Respondent's clear constitutional right to equal protection of the laws.

This case does not raise the question whether a national or state legislature can, by majority action of the relevant legislature, purport to waive the constitutional rights of whites to equal protection of the laws. There was here no legislative action that could be deemed to represent the will of the majority of the people of California. If there had been, it could not suffice to avoid the commands of the Equal Protection Clause. *Lucas* v. *Colorado General Assembly,* 377 U.S. 713 (1964).

Finally, the question in this case is not whether a large number of medical and law associations and other special interest groups think the departure from the principles of the Constitution's Equal Protection Clause is desirable. The plethora of amicus briefs do not reveal the attitudes of the public, but only the particular preferences of those who caused them to be written. On the other hand, a public opinion poll makes clear that this form of special preference for minorities is regarded as undesirable. And this is the point of view of nonwhites as well as whites. A Gallup Poll revealed that 83% of the population rejected the concept of special preferences for minori-

ties, including 64% of nonwhites. See *New York Times*, 1 May 1977, p. A33, col. 1. Indeed, in November, 1976, the Constitution of California was amended to provide that "no person shall be debarred admission to any department of the university on account of *race, religion, ethnic heritage, or* sex." CALIF. CONST. Art IX, §9(F). (The italicized words were added by the amendment.) This should leave no doubt that the people of California have spoken against the utilization of race as a standard for admission such as occurred in this case.

The sole question before this Court is whether the reverse discrimination attempted here by the University of California is inconsistent with the mandates of the Fourteenth Amendment's Equal Protection Clause and of Congressionally enacted civil rights acts prohibiting racial discrimination. Although the issue is a narrow one, its resolution has profound implications for the future of our society. As Professor Bickel put it, BICKEL, *supra* at 133:

> The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are to be more equal than others. Having found support in the Constitution for equality, they now claim support for inequality under the same Constitution.

II

The racial admission quota utilized by the Petitioner deprived Respondent of his constitutional right to equal protection of the laws.

The fact is that Respondent has been excluded from admission to the University of California's medical school at Davis because he is white. Had he been a nonwhite he would not have been excluded. Had he been a nonwhite, he could not have been excluded. *Sweatt* v. *Painter*, 339 U.S. 629 (1950). The question before this Court then is whether the constitutional rights of all "persons" protected by the terms of the Equal Protection Clause are to be denied to Respondent because of his race.

Does equal protection by the State, commanded by the Fourteenth Amendment, mean one thing as applied to whites and another when applied to nonwhites? Since whites and nonwhites, by definition, exhaust the universe, to what are the rights of nonwhites to be equal, if not the rights of whites? To what are the rights of whites to be equal if not to those of nonwhites? Equality denotes a relationship between or among those who are to be treated equally by the government. And the Equal Protection Clause means that the constitutional rights of a person cannot depend on his race, or it means nothing.

Thus, to grant privileges to nonwhites but to deny them to whites is an invalid denial of equal treatment under the law. *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976). To afford admission to a state medical school to one person because he is nonwhite and to deny it to an-

other because he is white must also be a denial of equal protection of the laws. The Equal Protection Clause commands that state governments treat persons equally unless their personal attributes or actions afford justification for different treatment. A difference in race cannot be an appropriate justification for different treatment by the state. As Mr. Justice Douglas said in *DeFunis*: "There is no constitutional right for any race to be preferred. . . . A DeFunis who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner." 416 U.S. at 336-37.

The essential arguments on behalf of Petitioner, however, are really not that race is a constitutional basis for differential state treatment or that the Equal Protection Clause condones different governmental treatment of different races, but rather that the commands of the Equal Protection Clause are to be subordinated to "higher values," higher than any that have a constitutional source.

The arguments for Petitioner suggest that the racial discrimination practised by the State of California here may be justified, despite the principles of the Equal Protection Clause, for any or all of four reasons. First, because what is involved here is a "benign" racial quota, euphemistically referred to by Petitioner and its amici as a "goal".* Second, because there is a compelling state

* The brief filed on behalf of the American Bar Association goes so far as to disavow support for "the use of quotas in admissions programs" (Brief, p. 20). However, ignoring an express finding that 16 out of 100 places in each entering class were reserved for special admission applicants and a further finding, not challenged on appeal, that "applicants who are not members of a minority are barred from participation . . . ." 18 Cal. 3d at 44, 132 Cal. Rep. at 687, 553 P. 2d at 1159, the ABA concludes that the Davis program utilized a "constitutionally permissible" goal and that the reservation of a fixed number of places for which white applicants could not compete "does not constitute a quota" (p. 20). With such "doublethink" it is little wonder that goals and quotas have come to be recognized as semantic equivalents.

(footnote continued on next page)

interest that overrides the command for equal treatment under the Equal Protection Clause. Third, because the racial quota here succors the socially or economically deprived, presumably only at the expense of the socially or economically affluent. Fourth, because the Equal Protection Clause should be read to protect only blacks and not those of other races. None of these is either factually true or, if true, adequate reason to override the Equal Protection Clause.

A. Racial quotas are intrinsically malign.

In what sense can a racial quota be benign so that a racial classification can be immune from the strictures of the Equal Protection Clause? Surely, there is no such thing as a benign racial quota if that means a measure for benefiting some races while imposing a disability on others. By definition a quota is a means of allocating scarce rights, goods, or services. If there were enough places at California's medical schools for all who wished to take advantage of them, there would be no need for a quota. A quota arbitrarily—*i.e.*, on grounds inconsistent with the equal treatment of equals—grants benefits to some by denying them to others. A racial quota is a measurement of an individual by a standard that must be wholly irrelevant in fact as well as law to the function for which the indi-

vidual is being measured, the benefit he is to receive, or the hardship that is to be imposed.

A racial quota is, therefore, not benign with regard to the individual who is deprived of benefits he would have had were he only of the preferred racial group. But a racial quota is not necessarily benign even for the individual or the group that is purportedly the beneficiary of the quota. The individual admitted under the quota will bear the stigma of one who could not "make it" under standards applicable to his fellow students. And fellow students of the same race will be stigmatized by the suspicion, however mistaken, that they were enrolled for professional study under diluted standards of admissions. Thus, a recently graduated black law student wrote:

> Traditionally, first-year law students are supposed to be afraid, or at least awed; but our fear was compounded by the uncommunicated realization that perhaps we were not authentic law students and the uneasy suspicion that our classmates knew that we were not, and, like certain members of the faculty, had developed paternalistic attitudes toward us. [McPherson, *The Black Law Student: A Problem of Fidelities*, *Atlantic* 93, 99 (April 1970).]

The problem was stated in broader terms in 1972, by Professor Thomas Sowell, in his book *Black Education, Myths and Tragedies* 292:

> What all the arguments and campaigns for quotas are really saying, loud and clear, is that *black people just don't have it*, and that they will have to be *given* something in order to have something. The devastating impact of this message on black people—particularly black young people—will outweigh any few extra jobs

> that may result from this strategy. Those black people who are already competent, and who could be instrumental in producing more competence among the rising generation, will be completely undermined, as black becomes synonymous—in the minds of black and white alike—with incompetence, and black achievement becomes synonymous with charity or payoffs.

Sowell reiterated his point in 1976, when he wrote that special admission policies limited to certain minorities "create[s] the impression that the hard-won *achievements* of [minority] groups are *conferred* benefits. Especially in the case of blacks, this means *perpetuating* racism instead of allowing it to die a natural death. . . ." Sowell, *"Affirmative Action" Reconsidered*, 42 *Public Interest* 47, 63 (Winter, 1976).

These nonbenign results of a "benign" racial quota are attested by Mr. Justice Douglas's opinion in *DeFunis*, *supra*, 416 U.S. at 343. Pointing to the "stigma" inherent in "a segregated admissions process," the implication "that blacks or browns cannot make it on their individual merit," he stated "is a stamp of inferiority that a State is not permitted to place on any lawyer." And as Mr. Justice Brennan said in *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, —— U.S. ——, ——, 97 S.Ct. 996, 1014, 51 L.Ed.2d 229, 251 (1977): "Furthermore, even preferential treatment may act to stigmatize its recipient groups, for although intended to correct systemic or institutional inequities, such a policy may imply to some the recipients' inferiority and especial need for protection."

Rather than contributing to the reduction of strife between whites and nonwhites, a "benign" racial quota ex-

acerbates it. As Professor Nathan Glazer has told us in his book *Affirmative Discrimination* 200-201 (1975):

> The gravest political consequence is undoubtedly the increasing resentment and hostility between groups that is fueled by special benefits for some. The statistical basis for redress makes one great error: All "whites" are consigned to the same category deserving of no special consideration. That is not the way "whites" see themselves, or indeed are, in social reality. Some may be "whites," pure and simple. But almost all have some specific ethnic or religious identification, which, to the individual involved, may mean a distinctive history of past—and perhaps some present—discrimination. We have analyzed the position and attitudes of the ethnic groups formed from the post-1880 immigrants from Europe. These groups were not particularly involved in the enslavement of the Negro or the creation of the Jim Crow pattern in the South, the conquest of part of Mexico, or the near-extermination of the American Indian. Indeed, they settled in parts of the country where there were few blacks and almost no Mexican Americans and American Indians. They came to a country which provided them with less benefits than it now provides the protected groups. There is little reason for them to feel they should bear the burden of the redress of a past in which they had no or little part, or to assist those who presently receive more assistance than they did. We are indeed a nation of minorities; to enshrine some minorities as deserving of special benefits means not to defend minority rights against a discriminating majority but to favor some of these minorities over others.

It is indeed difficult to discover where the benignity of a racial quota is to be found. Not in the deprivation of

benefits to the non-preferred race; not in the stigmatization of the preferred race; not in the effects on a riven society. A racial quota cannot be benign. It must always be malignant, malignant because it defies the constitutional pronouncement of equal protection of the laws; malignant because it reduces individuals to a single attribute, skin color, and is the very antithesis of equal opportunity; malignant because it is destructive of the democratic society which requires that in the eyes of the law every person shall count as one, none for more, none for less.

B. There is no state interest that can justify the use of a racial admissions quota.

The second argument for overriding the application of the Equal Protection Clause here is that there is a compelling state interest that warrants subordination of the constitutional command to the policy of the admissions committee of the medical school of the University of California at Davis. It is appropriate to note that this Court has consistently refused to credit any state policy as sufficient to overcome the invalidity of a state's racial classification. See, *e.g.*, *Missouri ex rel. Gaines* v. *Canada,* 305 U.S. 337 (1938); *Oyama* v. *California,* 332 U.S. 633 (1948); *Sweatt* v. *Painter,* 339 U.S. 629 (1950); *McLaughlin* v. *Florida,* 379 U.S. 184 (1964); *Loving* v. *Virginia,* 388 U.S. 1 (1967); *Hunter* v. *Erickson,* 393 U.S. 385 (1969). There would, indeed, be irony in any conclusion that the Fourteenth Amendment which, in its origins, whatever its present scope, was directed against state policies that called for racial classifications and racial inequalities should now be held subordinate to such state policies as mandate racial quotas.

But what is the state policy here that calls for overriding the Equal Protection Clause's ban on classifications by race? The first offered is a strange one, for it is itself based on racial categorization. The argument is that the black community needs more black doctors, the brown community more brown doctors, etc. Not more doctors, but more black and brown doctors. There is, of course, no evidence to support the argument for such a need. There is simply no basis, for example, for the inference that racial minority doctors will be more familiar with the health problems of the racial minorities from which they derive. Nor is there any basis in the record to show that training minority doctors will serve to increase the amount of health care available to racial minorities. See Leonard, *Placement and the Minority Student: New Pressures and Old Hang-Ups,* 1970 U. Tol L. Rev. 583.

The state policy of black doctors for black patients is itself at least suspect under the Equal Protection Clause and can hardly afford a principled exception to the ban on racial quotas. As Mr. Justice Douglas stated in his *DeFunis* opinion, *supra,* 416 U.S. at 342:

> The purpose of the University of Washington cannot be to produce black lawyers for blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for Irish. It should be to produce good lawyers for Americans and not to place First Amendment barriers against anyone.

The argument that the objective of the state is to afford more health care for the poor is no better. First it fails because, even if one assumes contrary to fact that poor medical students will necessarily attend poor patients, there

is no basis for the equation of racial minorities and poverty. Such a classification is both overinclusive because the category of nonwhites include many who are certainly not poor and underinclusive because the category of whites certainly includes many who are poor.

If the state is concerned to train medical personnel conversant with the diseases of the proverty-stricken, it can do so by offering curricula in public health and epidemiology directed to the understanding and treatment of the diseases of the poor. If the state is concerned to provide doctors for the poor, there are many means for it to afford rewards for those who will undertake to treat the poor, or even by providing, as it in fact does, the wherewithal for the poor to purchase needed medical services. It need not do so by invidious racial discrimination. Race is not equatable with poverty and the utilization of racial quotas for medical school admission is neither a real nor an appropriate means for enhancing the medical treatment of the impoverished.

C. The racial admissions quota is not addressed to the benefit of the socially and economically deprived.

This lack of equation between racial minorities and the poor, recognized by this Court in *James* v. *Valtierra,* 402 U.S. 137 (1971), and *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973), is also the reason why the third argument, that the quota imposed is not a racial quota but a quota based on social and economic deprivation must fail. There is nothing in the ruling below that precludes an admissions policy that favors those of deprived backgrounds, so long as it doesn't favor only whites

or nonwhites of deprived backgrounds. Nonwhites who are from deprived backgrounds are admissible under the racial quota imposed by California here. Whites who are from deprived backgrounds do not qualify for admission under the racial quota imposed by California here. The quota is not fixed by measurement of social and economic deprivation, it is measured by race and solely by race.

The suggestion that the Equal Protection Clause should be temporarily suspended in order to determine whether the state's experiment has a beneficial result, is only a plea for ignoring the commands of the Equal Protection Clause rather than abiding them. See *Lucas* v. *Colorado General Assembly*, 377 U.S. 713, 738 n. 31 (1964), quoted at p. 26, *infra*. As Mr. Chief Justice Hughes said in *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337, 352 (1938): "... we cannot regard the discrimination as excused by what is called its temporary character." And as Mr. Justice Jackson said in another context, "Such power [to suspend the Constitution] either has no beginning or it has no end. If it exists, it need submit to no legal restraint." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 653 (1952).

There is a constitutionally permissible and socially compelling need for experimentation with non-discriminatory approaches to University admissions that will afford the disadvantaged in our society better access to a higher education and the professions. There is a need for broader recruitment of, and compensatory training for, individuals who have not had adequate primary and secondary school education, for whatever reason. Finally, there is a need to develop university admissions criteria that can determine the true potential of such applicants "on an individual

basis, rather than according to racial classifications."* Unfortunately, Petitioner has chosen instead to experiment with special admissions programs based on race, and there is no real body of experience dealing with a disadvantagement or other nonracial approach to such programs.**

Affirmance of the judgment below will not mean an end to affirmative action. Rather it will mean a true beginning. Only after this Court had made clear that experimentation with racially discriminatory programs is impermissible will there be the impetus to develop admissions procedures that are both nondiscriminatory and humanitarian; only through such procedures can equal opportunity in higher education become a living reality for all people.

D. The Equal Protection Clause does not afford rights to blacks only.

Finally, it is argued that the Equal Protection Clause originally was written primarily for the protection of the newly emancipated blacks. Of this there can be no doubt. The inference sought to be drawn, that it does not afford equal protection to others, however, is without merit. As this Court said in *Brown* v. *Board of Education*, 347 U.S. 483, 489 (1954) (*"Brown I"*): "The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States.' Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most

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* *DeFunis* v. *Odegaard*, 416 U.S. 312, 341 (Douglas, J., dissenting).

** *See Report on Special Admissions at Boalt Hall after Bakke*, at 8.

limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty." See also *Harper* v. *Virginia State Bd. of Elections,* 383 U.S. 663, 669-70 (1966); Bickel, *The Original Understanding and the Segregation Decision,* 69 HARV. L. REV. 1 (1955).

Even if one takes some Radical Republican minority's expressions as the voice of the Equal Protection Clause, however, there is no evidence that the Equal Protection Clause can still be interpreted to protect only blacks. For such a construction has the Orwellian flavor of requiring that blacks be treated as equal to members of all other races, but no person of another race would be constitutionally entitled to equality with the blacks. Surely it is too late in the day for such an interpretation of the Equal Protection Clause. "[W]e cannot turn the clock back to 1868 when the Amendment was adopted. . . ." *Brown I,* 347 U.S. at 492. For as this Court said in *Buchanan* v. *Warley,* 245 U.S. 60, 76 (1917): "While a principal purpose of the [Fourteenth] Amendment was to protect persons of color, the broad language used was deemed sufficient to protect all persons, white or black, against discriminatory legislation by the States."

Asians, *e.g., Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886); *Oyama* v. *California,* 332 U.S. 633 (1948); corporations, *e.g., Smith* v. *Cahoon,* 283 U.S. 553 (1931); aliens, *e.g., Graham* v. *Richardson,* 403 U.S. 365 (1971); *Sugarman* v. *Dougall,* 413 U.S. 634 (1973); *In re Griffiths,* 413 U.S. 717 (1973); illegitimates, *e.g., Levy* v. *Louisiana,* 391 U.S. 68 (1968); *Gomez* v. *Perez,* 409 U.S. 535 (1973); nonresidents,

e.g., Memorial Hospital v. *Maricopa County,* 415 U.S. 250 (1974); new residents, *e.g., Shapiro* v. *Thompson,* 394 U.S. 618 (1969), and many others, most of them whites, all come within the protection of the Equal Protection Clause against state discrimination. The Equal Protection Clause, like the 1866 Civil Rights Act from which it derives, in the words of Senator Trumbull, "applies to white men as well as black men." CONGRESSIONAL GLOBE 599, 39th Cong., 1st Sess. (1866).

Moreover, the right to equal protection does not come to a person because he is a member of "a discrete and insular minority." Such membership, as in school desegregation cases, may establish the fact that he was among those discriminated against. It cannot be a requirement for invocation of the Equal Protection Clause unless most of this Court's interpretations of the meaning of that Clause are to be overruled. See, *e.g., Baker* v. *Carr,* 369 U.S. 186, 204-08 (1962); *Reynolds* v. *Sims,* 377 U.S. 533, 562-68 (1964).

A state's racial classification is necessarily "suspect." Not only has this Court found all racial classifications by states to be suspect, since the demise of the "separate but equal" doctrine, it has held them all to be constitutionally invalid. The constitutional right is the right of an individual, a "person," not the right of a class. "Here, petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws. . . ." *Missouri ex rel. Gaines* v. *Canada,* 305 U.S. 337, 351 (1938).

Where, as here, a state sought to justify its violation of the Equal Protection Clause on the ground that it was

necessary for the protection of "insular minorities," this Court gave the argument short shrift: "Also, the court below stated that the disparities from population-based senatorial representation were necessary in order to protect 'insular minorities' and to accord recognition to the 'state's heterogeneous characteristics.' Such rationales are, of course, insufficient to justify the substantial deviations from population in the apportionment of seats in the Colorado Senate under Amendment No. 7, under the views stated in our opinion in *Reynolds* [v. *Sims*, 377 U.S. 533 (1964)]." *Lucas* v. *Colorado General Assembly*, 377 U.S. 713, 738 n.31 (1964).

Indeed, the history of this Court's adjudications on the meaning of the Equal Protection Clause for the past quarter century disposes of the possibility of adopting the "blacks only" interpretation offered on behalf of the Petitioner here. The expression by this Court now of a concept of a black monopoly on the Equal Protection Clause must destructively tear the fabric that this Court has so carefully woven in recent years, woven for the purpose of establishing black equality but not for the purpose of establishing black privilege. Neither history, nor precedent, nor common sense can support such a judicial retreat from the established meaning of the Equal Protection Clause.

III

The Civil Rights Acts prohibit the racial quota utilized by Petitioner in this case.

The principle of nondiscrimination on the basis of race is not only a mandate of the Constitution but a legislative command as well. The provisions of the 1964 Civil Rights Act, 42 U.S.C. §§2000a *et seq.*, are of a piece in their condemnation of discrimination "on the ground of race, color, . . . or national origin." 42 U.S.C. §§2000a, 2000a-1, 2000b, 2000d.

Thus, 42 U.S.C. §2000a-1 provides:

> All persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof.

Unlike §2000a, §2000a-1, does not speak of "any place of public accommodation, as defined in this section," but of "any establishment or place." Whether or not a public university is an "establishment," *cf. Brennan* v. *Goose Creek Consolidated Ind. School Dist.*, 519 F.2d 53 (5th Cir. 1975) ("establishment" for purposes of F.L.S.A.), it clearly falls within the interdiction against racial discrimination contained in 42 U.S.C. §2000d:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be sub-

jected to discrimination under any program or activity receiving Federal financial assistance.

This Court has made it clear that under the Civil Rights Acts, exclusion even from a private school on the ground of race is a violation of federal law. *Runyon* v. *McCrary*, 427 U.S. 160 (1976). Since the university involved here is a public one, the ruling in *Runyon* is a fortiori applicable to it. See *id.* at 168n.8. That the Civil Rights laws protect whites as well as racial minorities from discrimination on the basis of race was established by this Court in *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

A decision by this Court that the actions of the University of California in establishing its racial quota for admission to the medical school at Davis violates the civil rights laws of the United States would avoid the necessity for any constitutional adjudication. As Mr. Justice Brandeis said in his classic concurring opinion in *Ashwander* v. *T.V.A.*, 297 U.S. 288, 347 (1936): "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter."

Conclusion

The essential argument made on behalf of the Petitioner is not that the racial quota here does not violate the Equal Protection Clause but rather that the Constitution should be bent, stretched, or broken in order to achieve what is asserted to be a worthy end in this particular instance. Even if the worthiness of the ends were to be acknowledged, the fundamental principle established by this Court that race is an invidious as well as an irrelevant factor on which to base state action—certainly in terms of admissions to public schools and universities—can not be so lightly dismissed. This nation has just been through a devastating constitutional crisis that resulted from actions of government officers who would justify unconstitutional means by what they perceived as desirable ends. Suffice it here to remind the Court of Mr. Justice Jackson's statement in another case in which the essential argument was that the ends justified the means, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 653 (1952): "I am not alarmed that it would plunge us straightway into dictatorship, but it is at least a step in that wrong direction." Or, in Mr. Justice Frankfurter's words in the same case, *id.* at 594: "The accretion of dangerous power does not come in a day. It does come, however slowly from the generative forces of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority."

The "numerus clausus" imposed by Petitioner here is likewise "a step in that wrong direction." And the imprimatur of this Court would afford legitimacy to further steps "in that wrong direction" toward a quota society. The language of the Constitution, the decisions of this Court, and its acknowledgment of the need to maintain

"the restrictions that fence in even the most disinterested assertion of authority," all call for affirmance of the judgment below.

As Professor Bickel said, BICKEL, *supra*, at 133, "[A] racial quota derogates the human dignity and individuality of all to whom it is applied; it is invidious in principle as well as in practice. Moreover, it can as easily be turned against those it purports to help. The history of the racial quota is a history of subjugation, not beneficence. Its evil lies not in its name but in its effect; a quota is a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant."

Respectfully submitted,

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